VALIDITY OF SEPARATE COACH LAWS WHEN APPLIED TO INTERSTATE PASSENGERS.

VARIOUS Southern States have enacted Separate Coach Laws and it has sometimes been assumed that the United States Supreme Court has finally passed upon all questions affecting the validity of such laws. This, however, is not the case. It is settled that such a law, when restricted to internal commerce or intrastate passengers, is valid, as a police regulation, which the State is authorized to adopt in the government of its local concerns. It has also been decided that a Separate Coach Law, general in its terms and not restricted, upon its face, to intrastate passengers, will be upheld as valid, when so restricted by the decision of the highest court of the State.[1]

Clearly, a law which provides for equality of accommodations for both white and colored passengers is not open to objection under the equal protection clause of the Fourteenth Amendment.

The Supreme Court has not yet been called upon squarely to decide the validity or effect of a Separate Coach Law enacted in general terms, and not restricted to intrastate passengers, either by the terms of the act itself or by the construction placed upon the act by the highest court of the State. Such a question is now pending before that court in McCabe, etc. *v.* A. T. & S. F. Ry. Co.[2]

The McCabe case involves the construction and effect of the Separate Coach Law of Oklahoma. It comes up by appeal from the Circuit Court of Appeals for the Eighth Circuit, which construed the law for itself (there having been no construction of the act by the Supreme Court of Oklahoma) and held, that, while general in its terms, it must be taken as restricted to intrastate passengers, upon the ground that the State of Oklahoma would have no power to enact such a law applicable to

[1] C. & O. Ry. Co. *v.* Kentucky, 179 U. S. 388, and cases there cited.
[2] No. 111 on the Calendar for the October Term, 1913.

interstate passengers and the legislature must be presumed to know the limitation upon its powers and to intend to enact a valid law and not an invalid one.

The opinion of the Circuit Court of Appeals was delivered by Judge Adams, Judge Hook concurring with him and Judge Sanborn dissenting.[3]

All the other Separate Coach cases, coming to the Supreme Court, have come through the highest courts of the respective States and those courts have thus had an opportunity to fix a construction upon their own statutes.

The pioneer case in the Supreme Court is Hall *v.* DeCuir.[4] That case involved an attempt by the "Carpet Bag" legislature of Louisiana to regulate the conduct by an interstate carrier of its business and to require such carrier to allow free access by all interstate passengers to the same cabin accommodations in its steamboats without regard to race or color. The Supreme Court held that this was a regulation of interstate commerce and therefore invalid under the Commerce Clause of the federal Constitution giving to Congress the exclusive power to regulate commerce "among the several States."

It is also interesting to note that, of all the cases thus far decided by the Supreme Court, Hall *v.* DeCuir is the only one turning upon the rights of interstate passengers. In all the other cases coming before it, the Supreme Court has found that the statute involved had been construed, by the highest court of the State enacting it, to apply only to intrastate passengers and when so restricted and applied the law in every case was upheld. This is true as to the Mississippi law,[5] and as to the Louisiana law of 1890,[6] and as to the Kentucky law.[7]

In the earlier cases, the State courts, when called upon to deal with this question, were apparently very chary of the question as to the right of the State to enact such a law applicable to interstate passengers. Having in mind the decision in Hall *v.* DeCuir, which struck down a law applying to interstate pas-

[3] 186 Fed. 966.
[4] 95 U. S. 485, 517.
[5] L. N. O. & T. *v.* Mississippi, 133 U. S. 587.
[6] Plessy *v.* Ferguson, 163 U. S. 537.
[7] C. & O. Ry. Co. *v.* Commonwealth, 179 U. S. 388.

sengers, the courts were first concerned with sustaining such laws as a valid police regulation of internal commerce, and they were careful to restrict their decisions to intrastate passengers and to declare that the acts in question would be valid, when restricted and applied to intrastate passengers, even though such acts might be void as applied to interstate passengers.

Now, having crossed this bridge, and having succeeded in getting the Supreme Court thus far committed, there is a tendency in some of the State courts to go a step farther and to declare that a law which has already been sustained by the courts as a valid exercise of the police power when applied to intrastate passengers must also be sustained as a valid police regulation when applied to interstate passengers. This view of the question is cogently presented by the Supreme Court of Mississippi.[8] Substantially the same view has been expressed by the Supreme Court of Tennessee.[9]

The Tennessee case is the first case which outlines this doctrine. It construes the Tennessee statute as applying both to interstate and intrastate passengers. As a matter of fact the Tennessee Supreme Court in its opinion went much further than was necessary to decide the case before it. In this respect it was less cautious than the Supreme Courts of Mississippi and Louisiana and the Court of Appeals of Kentucky had theretofore been.

In the Tennessee case, a conductor was indicted for failing to assign certain colored passengers to a coach in his train designated as the colored coach. So far as the facts of that case are disclosed the colored passengers in question may have been intrastate passengers. If so, the law of the State clearly applied to their case.

Following the Tennessee case, the Supreme Court of Mississippi in A. & V. Ry. Co. *v.* Morris,[10] took courage from the fact that the United States Supreme Court had already held the Mississippi statute valid as applied to intrastate passengers and

[8] A. & V. Ry. Co. *v.* Morris, 60 So. 11, decided Dec. 9, 1912.
[9] Smith *v.* State of Tennessee, 100 Tenn. 494, 41 L. R. A. 432.
[10] *Supra.*

advanced a step beyond its former decision upon that statute.[11] It took the same ground, as the Tennessee Supreme Court had taken, and argued most plausibly that nothing in the Mississippi statute restricts its meaning to intrastate passengers; that it must presume that the legislature meant to go as far in the matter as it could go; that if the separation of white and colored intrastate passengers is settled to be a valid police regulation the same principle must be applied to interstate passengers; that there is the same necessity for separating whites and blacks in interstate commerce as in intrastate commerce in order to prevent a clash between the races and that the State of Mississippi is not prevented by the Commerce Clause of the Constitution from enacting and enforcing such police regulations for the protection of its citizens as are reasonably necessary in the judgment of the law-making power of the State.

There is much force in this contention, especially when we consider the extent to which the Supreme Court has gone in upholding quarantine and inspection laws enacted by the various States in the protection of the public health.

It is further argued by the Mississippi court, that the State is not, by the Commerce Clause, automatically prevented from legislating in the protection of its own citizens, and that it is only excluded from such power of legislation, where Congress has acted, and only to the extent of such action.

Hall *v.* DeCuir is treated by the Mississippi court as presenting a very different question. It is argued that in Hall *v.* DeCuir, the State of Louisiana undertook to require, not the separation, but the commingling of the two races; that there is some reason for the exercise by the State of its police power to require the separation of the races, but no warrant whatever in the police power to sustain a law requiring the two races to be commingled; that the only authority of the State to affect interstate commerce, by its legislation, comes through the reasonable or valid exercise of the police power, and because that argument failed in Hall *v.* DeCuir, is no reason why it should not be urged in support of Separate Coach legislation.

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[11] L. N. O. & T. Ry. Co. *v.* Mississippi, 66 Miss. 662.

This argument is ingenious if not sound. As a matter of fact, it all depends upon the point of view. All of us can appreciate the point of view of Southern legislators who enact Separate Coach Laws at the present day. Not all of us can appreciate or understand the point of view of the "Carpet Bag" legislature of Louisiana when it undertook to require the commingling of the two races. It may be said that it had a public policy of its own; that it was looking forward to the cure of evils that it supposed would result from keeping up racial distinctions. While few, if any, of us can accept such view, we do know that in some countries racial distinctions have been broken down and in other sections of this country the races are admitted to equal facilities in schools and elsewhere. Certainly, it is a matter for the State itself to determine and if it, through its law-making power, determines upon a certain public policy, namely, the commingling of the two races, in order that, in its judgment, racial conflicts hereafter may be avoided, who is to review that public policy for the State and say that it is wrong? Can the federal government do so through any of its departments? If so, where is the sovereignty of the State? Certainly the States south of the Mason and Dixon line have a right to deal with this question as they see fit, and if so, other States have a similar right to use their judgment. So that, it is not true, as plausibly argued by the Mississippi court, that we cannot attribute any public policy or *bona fide* attempt at an exercise of the police power by the State in the enactment of the statute, struck down in Hall *v.* DeCuir, because it conflicted with the Commerce Clause.

It is further assumed by the Mississippi court that Congress has not legislated in the matter of transportation for interstate passengers, and, therefore, the States have power to act, until such time as Congress sees fit to exercise the dormant power vested in it by the Commerce Clause.

It is true that Congress has not enacted a Separate Coach Law or expressly forbidden the application of any such law to passengers in interstate commerce. It is not true, however, that it has failed to act in the matter of interstate transportation for passengers. It had not acted when the Tennessee case

was decided, but prior to the decision of the Mississippi case it had, in the Hepburn Law approved in 1906, taken charge of the subject and imposed an express statutory duty upon the carrier to furnish transportation for passengers in interstate commerce. By that law the following clause was introduced into the first section of the Act to Regulate Commerce:

> "And it shall be the duty of every carrier, subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor."

Prior to this amendment, there had been no express statutory duty imposed by Congress upon a carrier to furnish transportation. Its duty in that respect had been left to the common law and all congressional legislation had theretofore been directed to regulating the manner in which discrimination and injustice should be avoided in the performance by the carrier of its common-law duty. Under the law prior to 1906 it was held by the Supreme Court that the States had power to adopt regulations penalizing a carrier in interstate commerce for a failure to furnish transportation promptly or to make deliveries promptly in the course of transportation [12] but since the Act of 1906, it has been several times decided by the Supreme Court that State laws on the subject are absolutely superseded.[13]

Speaking through Chief Justice White, the court has distinctly declared that, by the amendment above quoted, Congress had occupied the field and necessarily, therefore, all legislation on that subject by the States had been superseded.

It seems clear, that, when Congress imposes a duty upon the carrier, to furnish transportation in interstate commerce, the passenger or shipper must base his rights upon the Act of Congress. He can have no rights except those conferred upon him by the Act of Congress.[14]

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[12] Mo. Pac. Ry. Co. *v.* Larabee Mills, 211 U. S. 623.

[13] C. R. I. & P. Ry. Co. *v.* Hardwick Elevator Co., 226 U. S. 426; Y. & M. V. R. Ry. Co. *v.* Greenwood Grocery Co., 227 U. S. 1; St. Louis, etc., Ry. Co. *v.* Edwards, 227 U. S. 265.

[14] Penn. R. R. Co. *v.* International Coal Co., 230 U. S. 197; Michigan Central R. R. Co. *v.* Vreeland, 227 U. S. 59; I. C. R. R. Co. *v.* Doherty, 153 Ky. 363.

It is not in the power of the State to supplement the rights given by Congress to interstate passengers, by legislation of its own, piecing or patching out the Act of Congress. The State cannot add to or subtract from the rights conferred upon or liability imposed by the Act of Congress. It cannot assume to cover a case which the Act of Congress appears not to fit. If Congress has legislated at all in reference to the matter of transportation for passengers in interstate commerce, it will be presumed to have covered the subject as fully and completely as it intended.

A most striking illustration of this principle arose under the Hours of Service Law, enacted by Congress, and construed in Northern Pacific Ry. Co. *v.* Washington.[15] In that case, it was held that the Hours of Service Law enacted by Congress superseded the statute of the State of Washington, almost identical in terms, and that the Washington statute was superseded, from the moment the act of Congress was approved, although the law enacted by Congress did not go into effect for a year. The court said it must be presumed that Congress, having entered the field, had occupied it, as completely as it intended the field to be occupied, and although the act of Congress made no reference to State statutes then in force, it must be presumed that Congress meant in postponing its own act to provide that commerce should be free from any regulation of that character until such time as its own act should become effective.

Now Congress has not provided a Separate Coach Law, as it might have done. Nor has it forbidden such a law. It has simply required the carrier to furnish transportation to passengers in interstate commerce. When it entered the field, if it did not cover it completely, it meant to leave that portion, not covered, unoccupied and unhampered by State legislation.

In this connection it should be observed, that the act of Congress, while excluding the States from legislation on the subject, leaves the carrier free, in the conduct of its business, to adopt and apply reasonable regulations, not inconsistent with the act of Congress. This principle was declared in C. & O.

[15] 223 U. S. 370.

Ry. Co. *v.* Chiles.[16] The Chiles case came up from Kentucky, though it did not involve the Separate Coach Law of that State, it being assumed that the law could not apply to Chiles, who was an interstate passenger.

Pursuant to a regulation adopted by the railroad company, Chiles, a colored man, was required, upon reaching the Kentucky State line, to leave the coach in which he had been riding with white passengers and go into another coach reserved for colored passengers. He complained of this in his action against the railroad company. The company defended on the ground that, having regard to the community served, it had adopted this regulation as a reasonable rule for the conduct of its business. The courts upheld the action of the railroad company.

In considering the extent of the police power, it is not out of place to allude briefly to the quarantine cases and to cases involving the shipment of "contraband" articles, such as liquors, etc. There is no class of business more clearly subject to police regulation than the sale or shipment of liquors. It is settled that the State can forbid intrastate shipments or sales of liquor, but acting by itself (without here considering the effect of the Webb Law), it cannot forbid interstate shipments or sale of liquor.[17] The same doctrine was announced in the cigarette case.[18] So as to quarantine regulations, it is settled, that where Congress has prescribed a system of quarantine, covering the subject, the police power of the State, in that respect, is completely suspended, so far as interstate commerce is concerned.

The limitations of the police power have been so recently summarized and stated by the Supreme Court in the Minnesota Rate Case[18a] that a mere reference to that case is all that would be justified in an article like this.

The cases show that these are live questions, especially in the Southern States. Of course, they cannot be authoritatively settled until the Supreme Court of the United States directly

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[16] 218 U. S. 71.

[17] L. & N. R. R. Co. *v.* Cook Brewing Co., 223 U. S. 70.

[18] Austin *v.* Tennessee, 179 U. S. 343.

[18a] 230 U. S. 398-410.

determines the effect, upon the rights of interstate passengers, of a Separate Coach Law unrestricted in its scope.

There is force in the reasoning of the Tennessee and Mississippi Supreme Courts on this subject, but so far as the Supreme Court has expressed itself, it seems to be committed against the view of those courts. Hall *v.* DeCuir is a direct authority, applying to interstate passengers and declaring that State laws, prescribing the accommodations to be furnished such passengers, are void under the Commerce Clause of the federal Constitution. Unless it can be distinguished, as the Supreme Court of Mississippi has attempted, it would seem that the Mississippi Court is wrong in its conclusions, as to the validity of a Separate Coach Law, when applied to passengers in interstate commerce. In Hall *v.* DeCuir,[19] Chief Justice Waite speaking for the court said:

> "If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. * * * On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

In Louisville, etc., Ry. Co. *v.* Mississippi,[20] the court, speaking through Justice Brewer, used the following language:

> "Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race was a question of interstate commerce, and to be determined by Congress alone."

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[19] 95 U. S. 485, 489.

[20] 133 U. S. 587.

The same principle was announced with reference to the Louisiana statute of 1890.[21]

In passing upon the Kentucky statute, the Supreme Court, speaking through Justice Brown in C. & O. Ry. Co. *v.* Kentucky [22] sustained the Kentucky Court of Appeals in upholding the statute when applied to interstate passengers and argued that the legislature must have meant to restrict the act to intrastate passengers.

In this connection the court said:

> "It is scarcely courteous to impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a Separate Coach Law was unconstitutional as applied to interstate commerce the law applying on its face to all passengers should be limited to such as the legislature were competent to deal with."

In the Chiles case,[23] the court took occasion to review the Separate Coach cases decided by it but followed the Kentucky Court of Appeals in putting the Kentucky statute out of consideration "on the ground that it had no application to interstate trains," and it referred to such laws in this language: "and we must keep in mind that we are not dealing with the law of a State attempting to regulate the interstate commerce beyond its power to make." [24]

It seems from these cases that the Supreme Court is clearly opposed to the view of the Mississippi court and, when the question comes before it, will hold that the Separate Coach Laws of the various States cannot be applied to interstate passengers, especially since the enactment of the Hepburn Law in 1906.

Possibly, a State might prohibit intrastate passengers from being mingled in the same coach with interstate passengers of a different race but there seems no warrant, even under the most extended doctrine as to the police powers of a State, for allowing a State to interfere with the mingling in interstate commerce of interstate white and colored passengers.

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[21] Plessy *v.* Ferguson, 163 U. S. 537.
[22] 179 U. S. 388.
[23] 218 U. S. 71. [24] Id., p. 75.

The decisions reviewed in the Minnesota Rate Case,[25] show the police power of the State in matters of interstate commerce to be subject to the following limitations:

(1) The State cannot directly burden interstate commerce at all.

(2) It cannot indirectly burden or affect interstate commerce, unless these conditions exist, namely:

(a) The regulations adopted by the State must be outside the scope of an act of Congress theretofore adopted, and

(b) The regulation must be reasonably necessary for the preservation of the internal peace, health or security of the State and its citizens.

Under this doctrine a State might justify the separation of intrastate passengers of one race from passengers of the other race whether interstate or intrastate. It is hard to see how it is concerned with the separation of white interstate passengers from colored interstate passengers. Where such passengers have ridden in the same coach without exciting disorder or riots, there would seem to be no reason for separating them when a state line is crossed. White citizens of the State might resent being placed in the coach with colored interstate passengers but they cannot reasonably be expected to start a riot simply because they see other white people from other States riding in the same coach with colored passengers. Hence there is no reasonable basis for the adoption by the State of a police regulation separating white from colored interstate passengers.

The questions involved are interesting and of practical importance and it is hoped that within the next few months there will be some conclusive deliverance on the subject by the Supreme Court in the case now pending before it.

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[25] *Supra.*